COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP71-CR **Cir. Ct. No. 2013CF1633**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEROY RUSHING, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Leroy Rushing, Jr., appeals the judgment convicting him of first-degree reckless homicide as a party to the crime while

armed with a dangerous weapon. *See* WIS. STAT. §§ 940.02(1), 939.05, 939.63(1)(b) (2013-14).[1] He also appeals the order denying his postconviction motion for resentencing. Rushing argues that he is entitled to resentencing because the circuit court erroneously exercised its discretion at sentencing by attempting to coerce an admission of guilt from him and by improperly commenting on his religious beliefs. We disagree and affirm.

I. BACKGROUND

¶2 The homicide charge against Rushing stemmed from a beating that occurred on March 31, 2013. According to the complaint, on that date, Rushing and Dexter Broughton beat the victim to death using a baseball bat.

¶3 An eyewitness for the State testified that she saw three men in an altercation in an alley near her home, one of whom was the victim. After seeing the victim being choked, the eyewitness saw Rushing take a baseball bat from his car and hit the victim three times—twice to the back of the head and once to the face.

¶4 Police officers testified to statements Rushing made. Rushing told police he was with Broughton on the day of the incident. He and Broughton ran into the victim at a liquor store. Rushing told police he gave the victim a ride to a nearby location and an argument followed over whether the victim would pay Rushing ten dollars. Rushing claimed he left without any sort of a physical altercation with the victim.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 Rushing testified at trial that most of what he told the police was true, with the exception of the remarks he made about Broughton. Rushing told the jury that it was Broughton who got the baseball bat out of his car and used it to beat the victim. Rushing claimed he had the bat in his car because he had recently been the victim of a robbery. According to Rushing, Broughton hit the victim one time with the bat. Rushing did not call 911 and told the jury: "[I] didn't want Dexter to get in trouble. I really didn't want to get involved. I just wanted to get to church."[2]

¶6 A jury found Rushing guilty.

¶7 During the sentencing hearing, the following colloquy took place:

> THE COURT: All right. And what about the witness who testified that she saw the bat in your hands?
>
> THE DEFENDANT: Ma'am, I did not see that little young lady.
>
> THE COURT: That's not my question. My question was what about the witness who saw the bat in your hands outside the car?
>
> THE DEFENDANT: She lied, ma'am. She didn't see me.
>
> THE COURT: And what reason on God's green earth would this girl have to lie? Does she know you?
>
> THE DEFENDANT: No, she don't.
>
> THE COURT: Okay. So she didn't know [the victim]. She doesn't know Mr. Broughton. What reason possibly would she have to lie?
>
> THE DEFENDANT: Ma'am, she didn't even pick me out of the lineup.

[2] The incident occurred on Easter Sunday.

> THE COURT: That's not my question.
>
> THE DEFENDANT: I don't know. I don't know what reason does she have to lie, ma'am. I know she didn't see me.

Later, in its sentencing remarks, the circuit court said:

> Assuming that you say—what you say is true, that you were in the car on the phone and you saw Dexter Broughton through the rear view mirror hit your friend with a baseball bat, you did the ultimate hypocritical thing and left him there and went to church. Instead of doing what all these good church going people would have hoped that you would have done.

The circuit court went on to state:

> And you continued to try and get yourself out of this situation with your denials and your lies, Mr. Rushing, and it is offensive that you hide behind your religious beliefs to do so. It's contrary to everything that you profess to believe in.
>
> So the Court does feel that a term of incarceration in the Wisconsin [s]tate prison system is of course appropriate in this case.

¶8 The circuit court sentenced Rushing to thirty-five years in prison, bifurcated as twenty years of initial confinement and fifteen years of extended supervision.

¶9 Rushing then filed a postconviction motion for resentencing. He argued that during the sentencing hearing, the circuit court attempted to coerce an expression of guilt from him and improperly commented on—and took into consideration—Rushing's religious beliefs.

¶10 The circuit court denied Rushing's motion without a hearing. In its decision, the circuit court explained:

> [T]he court did not base its sentencing decision on the defendant's religion or religious practices. While the court did comment on the defendant's professions that he was a "church-going man" of good character, it was plainly invited commentary. Clearly, the *defendant* raised the issue of his religious practices when he testified before the jury and discussed his need to leave the scene of his friend's homicide because he was in a hurry to get to church. In the court's estimation the *defendant* testified thus (as opposed to saying he was going to the track or to work) to curry favor with the jury. Similarly, the *defendant* injected his religious practices into the sentencing proceedings via his character witnesses and their statements in support of him. The court addressed those issues *as they were raised by the defense* in the context of considering the defendant's character. There is nothing in the record to give credence to the defense assertion that the court's sentencing was somehow based on any prejudice or reliance on any impermissible factor.

As to Rushing's claim that the circuit court attempted to coerce an admission of guilt, the circuit court wrote:

> The record reflects that the court's colloquy with the defendant as to the defendant's version of events both before and after the homicide was driven by the lack of credibility of the defendant's trial testimony. There was a clear difference between the testimony of the unrelated witnesses and the version offered by the defendant. There is a distinction to be made here: the court did not base its sentence exclusively upon a failure by the defendant to accept responsibility. Rather, the record reflects that the court considered the defendant's lack of credibility (in his sworn trial testimony) as *an aspect* of the proceedings relevant to sentencing.

(Bolding omitted.)

II. ANALYSIS

¶11 Rushing renews his postconviction arguments on appeal.

¶12 Review of a sentencing decision is limited to determining whether discretion was erroneously exercised. ***State v. Harris***, 2010 WI 79, ¶30, 326

Wis. 2d 685, 786 N.W.2d 409. "Discretion is erroneously exercised when a sentencing court imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors." ***Id.*** A defendant must show by clear and convincing evidence that the sentencing court actually relied on an improper factor. ***Id.***, ¶34. When determining whether the sentencing court erroneously exercised its discretion, we must "review the sentencing transcript as a whole, and ... review potentially inappropriate comments in context." ***Id.***, ¶45.

¶13 During sentencing, the circuit court must consider three primary factors: (1) the seriousness of the crime; (2) the defendant's character; and (3) the need to protect the public. *See* ***State v. Davis***, 2005 WI App 98, ¶13, 281 Wis. 2d 118, 698 N.W.2d 823. Courts may also consider secondary factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

State v. Gallion, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted).

¶14 Rushing argues that the circuit court questioned him in a way that was intended to compel an admission of guilt from him. Specifically, Rushing points to the circuit court's request that Rushing explain why the State's witness would lie. According to Rushing, this question had only one purpose: "To compel Rushing to admit that he was guilty of the offense." (Emphasis and footnote omitted.)

¶15 We disagree. This is not a situation where the circuit court imposed a harsher sentence solely because the defendant refused to admit his guilt. *See* ***Scales v. State***, 64 Wis. 2d 485, 495-96, 219 N.W.2d 286 (1974). Instead, by asking an open-ended question, the circuit court sought to have Rushing account for eyewitness testimony that was starkly at odds with Rushing's own versions of events. This information was helpful to the circuit court in making its credibility determination where it was left to compare Rushing's self-serving version of events offered at trial with the eyewitness's testimony and Rushing's earlier statements to police. Rushing has not provided this court with the requisite clear and convincing evidence showing that the circuit court actually attempted to compel an admission of guilt.

¶16 Additionally, Rushing takes issue with the circuit court's statements that Rushing's reliance on his religious beliefs was offensive and that his behavior demonstrated he did not live by the tenets of his religious faith. However, when considered in context, it is clear that the circuit court's statements were not directed at Rushing's religious beliefs. *See* ***State v. Ninham***, 2011 WI 33, ¶96, 333 Wis. 2d 335, 797 N.W.2d 451 (a circuit court may not base its sentencing decision on the defendant's religion, or lack of it). Rather, they were directed at his incredible story of being in such a rush to get to church that he did not help an old friend who had been badly beaten. The circuit court's skepticism about Rushing's story reflected its consideration of his character—and was not "the explicit intrusion of personal religious principles as the basis of a sentencing decision," which was the scenario presented in ***United States v. Bakker***, 925 F.2d 728, 741 (4th Cir. 1991), on which Rushing relies.

¶17 The sentencing transcript does not support Rushing's claims that the circuit court relied upon improper factors during sentencing. Additionally, in its

decision denying Rushing's postconviction motion, the circuit court expressly disavowed any improper reliance on the challenged remarks. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion.). Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.